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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 133

NORTON COMPANY, a corporation,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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The Question Sought To Be Presented.

Petitioner manufactures and sells tangible products. Its main office is at Worcester, Massachusetts. It maintains a warehouse in Illinois, at which it accepts orders and from which it ships its products in concededly taxable intrastate transactions. But it also accepts in Massachusetts orders for shipment of its products from Massachusetts for delivery in Illinois. Is the Commerce Clause offended by measuring the Illinois Retailers' Occupation Tax by the gross receipts from these interstate sales?

ARGUMENT.

I.

The Commerce Clause does not inhibit the exaction of the tax involved in this case.

The Illinois Supreme Court said in deciding the instant case (405 Ill. 314) (Tr. 133):

> "It was never intended that interstate commerce should not bear its own share of taxation. There would be no doubt that the State could tax sales made by the appellant if it were an Illinois corporation selling to customers in this State. It would be inequitable to say that the same corporation should not pay a similar tax when it manufactures out of the State and ships and sells within the State. On the same basis, foreign corporations should not receive preference in business competition over business within the State by being exempt from paying such tax. By making the appellant pay, as in the situation before us, the State is not making an out-of-State company pay more than its fair share of the taxation burden. It is not attempting to tax gross receipts of appellant nor to tax goods which are sold or consumed or used in other States. The State is only making appellant pay the same tax as is required of its own citizens."

Insofar as this determination may be regarded as a pronouncement upon the facts, including the fact of reasonableness, it is, we submit, conclusive at the bar of this Court unless it can be said to be without substantial support in the record or in those matters of fact of which courts take judicial notice.

BRIEF SUMMARY OF THE RELEVANT PRESENTLY STANDING PRINCIPLES OF CONSTITUTIONAL LAW RELATING TO TAXES MEASURED BY GROSS RECEIPTS FROM INTERSTATE SALES.

It is no longer a precept of Federal constitutional law, if it ever was, that a State tax is invalid merely because it is measured by the gross receipts from sales of goods shipped in interstate commerce. So far as this Court is concerned, such a tax is not *per se* invalid. This is true whether the taxing State conceives the exaction as a "use tax" levied nominally upon the purchaser but for which the seller is liable to the State, the orders being accepted either within or without the state and the goods being shipped from without the State,[1] or a "sales tax",[2] or a "tax upon the privilege of doing business" although the sales involve transportation in interstate commerce from the taxing State to other States[3] or involve transportation from sister States to customers also without the taxing State.[4]

With these cardinal principles in mind, let us consider the following recent monuments in the field of constitutional law as applied taxes measured by gross receipts from sales involving interstate commerce either before or after the technical "passage of title".

NELSON v. SEARS ROEBUCK & CO., 312 U. S. 359, AND NELSON v. MONTGOMERY WARD & CO., ID.

These two companion cases involved the following facts:

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[1] *Felt and Tarrant* v. *Gallagher*, 306 U. S. 62. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359. *Nelson* v. *Montgomery Ward & Co.*, *id.* 373. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, in which the vendor did no business in the taxing State except soliciting orders and the goods were shipped from without the State.

[2] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33.

[3] *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459.

[4] *American Mfg. Co.* v. *St. Louis*, cited note 3 above, some of the goods involved having been shipped from within, some from without, the taxing State.

Iowa law levies a "sales tax" nominally imposed on intrastate buyers and a complementary "use tax", nominally imposing the latter exaction upon Iowa residents who import goods from out-of-State vendors. But although the two companion taxes were thus nominally imposed upon the purchaser, the vendor was required to "collect" and in fact to pay the tax. There was of course no actual machinery for collecting the tax from Iowa residents because Iowa authorities could have no conceivable means of knowing what goods a resident of Des Moines or Dubuque bought from Sears Roebuck except by surveillance of Sears Roebuck.

Thus, so far as the flow of interstate commerce was concerned, which is all that this Court was concerned with, the economic incidents, consequences and burdens were exactly like those entailed by the Illinois act: An Iowa purchaser ordered goods from Sears, Roebuck or Montgomery-Ward, paid a sum that constituted the purchase price augmented by the tax and received his goods. *The goods were shipped from Illinois. And in many cases, the orders were not only accepted in Illinois but were first received there.* But, as in the instant case, both Sears, Roebuck and Montgomery-Ward maintained retail stores in Iowa. *Although the orders were not received or accepted in,* nor were they filled from, these Iowa stores, this Court held the Illinois mail order companies liable for the Iowa tax.

Since this Court stresses practical incidence and consequences of the tax burdens, not the metaphysics of State jurisprudence, as the *criterion* of Federal constitutionality, it is simply unthinkable that this Court would have reached a different result if Iowa had laid the tax in terms upon the mail order houses rather than upon the purchasers.

But if, notwithstanding the precise economic similarity between the Iowa "use tax" imposed upon the buyer but

actually remitted by the seller and the Illinois tax, it is insisted that the theoretical distinction between a tax on the "buyer" and a tax on the "seller" is material, let us consider the case of

AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459.

In this case St. Louis imposed a privilege tax upon the privilege of manufacturing within the city limits, the tax being payable annually and *measured by the gross receipts from the sale of the manufactured goods.*

The taxpayer removed some of its goods, without selling the same, to warehouses outside of Missouri. Later it sold these goods, shipping them from points outside Missouri. It also sold some goods in interstate commerce, shipping directly from Missouri. This Court held that both types of sales—those in which shipment was made from within, and those in which shipment was made from without, the taxing State—might properly measure a privilege tax.

McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

The Illinois Supreme Court has recognized this case as marking a turning point in constitutional doctrine so far as the taxability of interstate commerce is concerned. See the Illinois Supreme Court's opinion in *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136.

In the *Berwind-White* case, a New York sales tax was measured by the gross receipts from the sale of coal. The orders were accepted in New York. But the coal was mined in Pennsylvania. In most cases the coal was delivered in New York. But the dissenting opinion notes (p. 60) that there "were two purchasers who took delivery outside New York." The tax was sustained.

INTERNATIONAL HARVESTER CO. v. DEPARTMENT OF THE TREASURY, 322 U. S. 340, AND THE COMPANION CASE GENERAL TRADING CO. v. TAX COMMISSION.

Closely in point is this Court's decision *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340.

In that case this Court had occasion to determine the validity of Indiana's gross receipts tax to transactions, *inter alia*, which it thus described:

> "Sales by branches to dealers and users residing in Indiana, in which the goods were shipped from outside Indiana to customers in Indiana, by contracts so providing."

If petitioner seeks to distinguish this case on the ground that the sale was made "by branches in Indiana", the reply is that the companion case of *General Trading Co.* v. *Tax Commission*, *id.* 335, the General Trading Co. "never qualified in Iowa and has no office, branch or warehouse there" (*dissent*, page 339) and "orders are accepted only in Minnesota." Nevertheless this Court sustained the tax. True, the Iowa tax was nominally imposed on the purchaser and the non-resident taxpayer was nominally a "collector." The fact remains, though, that one who merely solicited orders in Iowa was subject to that State's taxing power, the tax being measured by gross receipts, even though the goods were shipped and title passed from without the State.

These two cases, which were decided together and must be read together, sustain State taxes even though (1) the taxpayer receives orders without the taxing State, accepts them without the State and fills them without the State if it does *any business at all, even though the business involved be only soliciting* within the State where the goods are delivered.

THE APPLICABILITY OF THE FOREGOING CASES TO THE INSTANT CASE.

Perhaps no one of the cases cited above, *standing alone*, would be immediately controlling in the instant case. Possibly each of them, *standing alone*, could be distinguished from the instant case in some feature that might be thought salient. But *read compositely*, they dispose of *every point made by petitioner for the invalidity of the instant taxes.* Let us show this:

It might be thought from this Court's diction in the *Montgomery-Ward* and *Sears, Roebuck* cases that the important consideration in those cases was that Iowa had imposed a "use tax" on Iowa purchasers who ordered goods from without the State as a corollary to a "sales" tax on purchasers who bought them without the State. But in the *American Manufacturing* case, the tax was a privilege tax on the seller.

It might be thought from the *American Manufacturing Co.* case and the *Berwind-White* case that the important thing was the acceptance of orders in the taxing state. But in the *Sears, Roebuck* and *Montgomery-Ward* cases, the orders were received in Chicago. They were accepted there. The goods were shipped from there. Title passed there, yet an Iowa tax was sustained.

In the *Sears, Roebuck* case this Court held *directly and specifically* that the presence of retail outlets in Iowa was sufficient to subject Sears, Roebuck to the exertion of Iowa's taxing power *even when the tax imposed was measured by sales as to which the order was received, accepted and filled in Chicago.*

CASES INVALIDATING CERTAIN STATE TAXES DISTINGUISHED.

Petitioner relies on *Crenshaw* v. *Arkansas*, 227 U. S. 389. This case is effectively distinguished on one ground by *Berwind-White*, cited *ante*, and on another by the *Sears, Roebuck* case, also cited *ante*. It struck down a tax in the form of a *flat license fee* for each solicitor of an extra-State vendor. The vendor did no business in the State except solicit orders and ship and deliver merchandise. In the *Berwind-White* case this Court, distinguishing a line of cases like the *Crenshaw* case, said at page 57:

> "It is enough for present purposes that the rule" [that is, the rule forbidding license fees or taxes for merely soliciting orders] "has been narrowly limited to *fixed sum* license taxes imposed on the business of soliciting orders for goods to be shipped in interstate commerce."

In the *Sears, Roebuck* and *Montgomery-Ward* cases this Court indicated *passim* that immunity to tax with respect to one who merely solicits orders is limited to one who *does not maintain a retail outlet in the taxing State*. The presence of such an outlet, this Court held, supports the exertion of the State's taxing power *even though the tax is measured by sales representing orders received, accepted and filled wholly within another State*. And finally in the *General Trading Co.* case, *ante*, the court removed even this limitation. It sustained the collection of a tax *even though the company had no office at all in the taxing State and merely solicited orders there*.

Therefore, to sum up and dispose of the *Crenshaw* case: It involved a tax which, *first*, was a "fixed fee" and, *second*, was sought to be imposed upon *a vendor who had no retail outlet in the taxing State*. Each of these features, present in *Crenshaw* and absent here, has been held to dis-

tinguish the *Crenshaw* type case from cases like the instant case. Finally the *General Trading Co.* case does away even with the requirement that there be a retail outlet in the taxing State.

Freeman v. *Hewitt*, 329 U. S. 249, and *Adams* v. *Storen*, 304 U. S. 307, can be shortly disposed of. The Indiana "gross receipts tax" is levied on the receipt of *all* income by a resident of Indiana, whether derived from within Indiana or not, and upon income accruing even to non-residents if its source is within Indiana. *The tax is tied to no activity, privilege or other basis than residence or, in the case of non-residents, situs of the source within Indiana.* In the *Adams* case this Court makes it plain that Indiana could have taxed the sales in question if it had undertaken to do so under an act taxing the privilege of making them and not under a statute leveled at *all* interstate income of residents. The court said at page 310:

> "The" (Indiana gross receipts) "tax is not an excise for the privilege of domicile alone, since it is levied upon the gross income of non-residents from sources within the State. Nor is it for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

The court further said at page 312:

> "The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459. . . . But that case dealt with a municipal license fee for pursuing the occupation of manufacturer in St. Louis."

Thus the *Adams* case declares in express terms that a tax on gross receipts from interstate commerce is constitutional *if it is levied upon the privilege of doing business* and that *this is true even though the goods are shipped from without the State;* for in the *Adams* case the court approved but distinguishes the *American Mfg. Co.* case

on the ground that the tax in the American Mfg. Case was a privilege tax.

The *Hewitt* case, cited above, is likewise distinguishable. There the taxpayer sold securities in another State through a broker. He was not taxed for the privilege of selling them. The tax was not an income tax, the basis for which is domicile, because it "hit non-residents." And it was not a privilege tax because it was aimed at no privilege. There was therefore no basis for this wholly impost on the proceeds of the sale of securities outside of Indiana.

THE PRINCIPLE EMERGENT FROM THE CASES CITED UNDER THIS POINT.

From the authorities above considered there emerges this principle, clearly defined and decisively applicable in this case:

> ONE WHO ENGAGES IN BUSINESS IN ILLINOIS TO THE EXTENT OF MAINTAINING SALES PERSONNEL AND A STOCK OF GOODS MAY BE TAXED, SO FAR AS THE UNITED STATES CONSTITUTION IS CONCERNED, UPON SALES WHERE THE GOODS BOUGHT ARE SHIPPED INTO THE STATE. THIS IS TRUE NO MATTER WHERE THE ORDER IS ACCEPTED AND NO MATTER WHERE TITLE PASSES. EVEN THE SOLICITATION OF ORDERS ALONE MAY BE TAXED PROVIDED (1) THAT THE TAX IS MEASURED BY THE VOLUME OF ORDERS ACCEPTED WHERE GOODS ARE SUBSEQUENTLY SHIPPED INTO THE STATE OR (2) IS COUPLED WITH THE MAINTENANCE OF RETAIL OUTLETS. THIS IS TRUE EVEN THOUGH THE ORDERS HAVE NOTHING TO DO WITH SUCH OUTLETS AND ARE ACCEPTED IN ANOTHER STATE.

This principle rules this case so far as constitutional questions are concerned.

The Illinois constitutional or legislative theory upon which the tax is predicated is of moment here so long as the *application of the theory* does not result in any dis-

crimination, preferment or burden that would offend Federal constitutional doctrine. True, this Court has from time to time looked at the theory implicit in a state taxing statute that has been assailed as offensive to the Commerce Clause. But it has looked to the state's theory of taxation only insofar as that theory may have marked, or may be supposed to mark, practical limits of taxation that may result in an unconstitutional *onus* on interstate commerce. Thus, in *Freeman* v. *Hewitt*, 329 U. S. 249, analyzed and discussed, *ante*, this Court did take into account the character of the Indiana state tax as a "gross receipts tax", observing that it was tied to no activity, privilege or other basis than residence or, in the case of non-residents, situs of the source within Indiana. But this theory had to do, not merely with Indiana's *rationale*, of the legitimacy of the tax under Indiana's constitution, but with the actual and practical preferences or discriminations that might result from the tax. Multiplication by several states of "gross receipts taxes" of Indiana's type might very well restrain interstate commerce. By doing a concededly intrastate and concededly taxable business, coupled with making shipments of goods that ultimately come to rest in Illinois, affords a very appropriate objection upon which to exert the State's taxing power.

The Illinois Supreme Court's opinion is conclusive as to all matters of fact including, we submit, the fact of reasonableness, the Illinois Supreme Court's opinion as to reasonableness not being in itself unreasonable. It is likewise conclusive as to all questions of the legitimacy of the tax under Illinois law.

We respectfully submit that the Illinois taxing statute, as construed by the Illinois Supreme Court, and as applied to facts in this case as found or judicially noticed by that

court, is constitutional and that its imposition raises no questions so fairly debatable as to elicit *certiorari*.

Conclusion.

For the reasons stated in the Illinois Supreme Court's opinion and urged in this brief, it is respectfully submitted that *certiorari* should be denied.

Respectfully submitted,

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